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No. _____

IN THE

Supreme Court of The United States

1973

EARL CHRISTOPHER HUNTER

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO VACATE JUDGMENT

The petitioner, Earl Christopher Hunter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 11, 1973, rehearing denied June 13, 1973, and moves the court to vacate the judgment of the Seventh Circuit Court of Appeals and in support thereof shows the court as follows:

1. There was no formal opinion by the United States District Court for the Southern District of Indiana. The

United States Court of Appeals for the Seventh Circuit rendered its written opinion, which is unreported as of this date. The order denying petitioner's petition for rehearing was printed, but it is unpublished as of this date.

2. Jurisdiction of this court is invoked under 18 U.S.C. 1254 (1).

3. The date of the judgment sought to be reviewed entered by the United States Court of Appeals for the Seventh Circuit was April 11, 1973, and the order denying a rehearing was dated and filed June 13, 1973.

4. The nature of the case presented to this Honorable Court is a criminal case and the questions presented for review are the constitutionality of the Act under which petitioner was convicted, being 18 U.S.C. 1955, and whether the petitioner was denied due process of law in violation of the Fifth Amendment to the Constitution of the United States by the court's compelling testimony against him not in accordance with 18 U.S.C. 6003. The constitutional provisions and statutes which the case involves are 18 U.S.C. 1955, 18 U.S.C. 6003, Article I, Section 8 of the Constitution of the United States of America, the Fifth Amendment to the Constitution of the United States of America and the Tenth Amendment to the Constitution of the United States of America. The pertinent portions of the constitutional provisions and statutes above named are set forth in the appendix to this petition, marked "Exhibit A".

5. This case was initiated by the United States of America by the filing of a grand jury indictment on February 10, 1972 against the petitioner and others charging the petitioner in two counts, Count I being a violation of 18 U.S.C. 371 and Count II a violation of 18 U.S.C. 1955.

(R 9-11) The petitioner filed a motion to dismiss the indictment, which motion was overruled. (R 2, 4) The petitioner and others were convicted on both counts of the indictment in the United States District Court for the Southern District of Indiana on June 23, 1973. (R 6) Thereafter, the petitioner appealed his convictions on both counts of the indictment to the United States Court of Appeals for the Seventh Circuit. That Honorable Court, on April 11, 1973, reversed the petitioner's conviction on Count I of the indictment, but affirmed the petitioner's conviction on Count II of the indictment. On June 13, 1973 that Honorable Court denied the petitioner's petition for a rehearing as to his conviction on Count II of the indictment affirmed by the Seventh Circuit Court of Appeals.

18 U.S.C. 1955 is the Act under which petitioner has been convicted, which Act purports to make it a crime to operate an illegal gambling business without any evidence produced showing interstate commerce. At the trial of petitioner the District Court, over the objection of the petitioner's attorney, compelled witnesses to testify who had claimed Fifth Amendment privileges at the request of the United States of America, without any showing as required by 18 U.S.C. 6003 (b), which denied to petitioner due process of law that is guaranteed to him by the Fifth Amendment of the Constitution of the United States of America.

6. Petitioner seeks review of the orders of the United States Court of Appeals for the Seventh Circuit on two bases:

(1) That 18 U.S.C. 1955 is unconstitutional, and,

(2) That petitioner was denied due process of law by the admission of evidence in the trial court

over petitioner's objection by non-compliance of the United States of America with 18 U.S.C. 6003 (b).

18 U.S.C. is an Act passed by Congress in 1970 purporting to charge a crime of operating an illegal gambling business without any showing whatsoever of interstate commerce. Petitioner believes that this Act is an unwarranted extension of the commerce clause in Article I, Section 8, of the Constitution of the United States of America and in violation of the Tenth Amendment to the Constitution of the United States of America, which reserves all powers not delegated to the United States by the Constitution or prohibited by it to the states of the United States of America. The offense which Congress attempts to legislate against and make a crime is a local offense, subject to local laws. Presently pending in this Honorable Court is a petition for certiorari based upon this issue, being *Becker, v. United States* (1972), 461 F.2d 230, Supreme Court case No. ———. This Honorable Court has not ruled on the constitutionality of 18 U.S.C. 1955 in any other case, as of the date of this petition. Petitioner realizes that in civil matters the commerce clause in the Constitution of the United States has been construed broadly. Petitioner believes that the commerce clause in criminal law has been construed exactly oppositely from that of civil law and jurisdiction without interstate commerce being involved or shown and proven has most uniformly been held invalid. *United States v. Bass* (1971), 92 S.Ct. 515, *United States v. Rewis*, 91 S.Ct. 1056.

At petitioner's trial in the District Court witnesses were ordered by the trial judge to testify after having claimed Fifth Amendment privileges on a petition filed by the

United States Attorney which did not comply with 18 U.S.C. 6003 (b). The petitions by the United States Attorney were objected to by petitioner but overruled by the trial judge and damaging testimony was allowed to be entered, pursuant to the petition, by the witnesses as ordered by the trial judge. (TR. VOL. VI, PP814-854, TR. VOL. VII, PP945-975)

The procedures involving use transactional immunity under 18 U.S.C. 6003 as relate to 18 U.S.C. 6002 are comparable to the procedures regarding wiretap applications made by the Attorney General under 18 U.S.C. 2518 and 18 U.S.C. 2516.

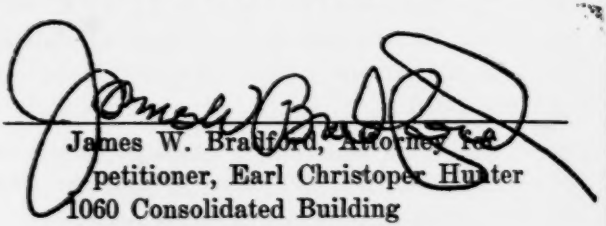
The petitioner can find no cases directly relating to 18 U.S.C. 6002 and 18 U.S.C. 6003 in support of his position. In two recent cases which parallel petitioner's contention under 18 U.S.C. 2518 and 18 U.S.C. 2516 the two Circuit Courts of Appeal have held that there must be a clear showing of compliance and authority or an application to authorize a wiretap is invalid. *United States v. Chavez* (1973) 9th C.A. —— F.2d —— and *United States v. Robinson* (1973) 5th C.A. —— F.2d ——.

In this cause it is clear that use immunity testimony applications and wiretap applications are closely parallel and that the United States of America did not make a proper application to the trial judge in this case and the testimony ordered received by the trial judge violated the Fifth Amendment rights of the petitioner to due process of law.

Petitioner submits that the matters raised in his petition are important questions of federal law which have not been settled as of this date by this court and are of great public importance and should be decided by this Honorable Court.

7. That appended to this petition are a copy of the United States Court of Appeals for the Seventh Circuit's opinion dated April 11, 1973 and a copy of its order denying a rehearing petition filed by petitioner dated June 13, 1973, which opinion and order are marked "Exhibit B".

For the foregoing reasons this petition for a writ of certiorari and a motion to vacate judgment should be granted.



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APPENDIX

EXHIBIT A

Constitution of the United States of America:

Article I, Section 8. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *"

Fifth Amendment. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Tenth Amendment. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Statutes:

18 U.S.C. 1955.

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business

and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private share-

holder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

18 U.S.C. 2516.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robberty, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 4503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political sub-

division thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investgation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. 2518

§ 2581. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall

be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur.

In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact or the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to

be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence drived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence drived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

18 U.S.C. 6002.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. 6003

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an

order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

EXHIBIT B

IN THE

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1972—January Session, 1973

No. 72-1700	)	
United States of America,	)	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis, Division
Plaintiff-Appellee,	)	
vs.	)	
Earl Christopher Hunter, et al.,	)	
Defendants-Appellants.	)	No. IP 72-CR-30
No. 72-1701	)	
United States of America,	)	William E. Steckler,
vs.	)	*Judge.*
Plaintiff-Appellee,	)	
Hyland Hill,	)	
Defendant-Appellant.	)	

Argued January 17, 1973—Decided April 11, 1973

Before

DUFFY, *Senior Circuit Judge,*
KILEY and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* Fourteen defendants were indicted as joint participants in an Indianapolis gambling operation. Count I charged a conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 371; Count II charged that the same defendants engaged in the same illegal gambling business "in concert with each other" in violation of 18 U.S.C. § 1955. Shortly after the trial commenced, the charges against one defendant were dismissed and 11 defendants pleaded guilty. Appellants Hunter and Hill were tried and found guilty on both counts. Their appeals principally question: (1) the constitutionality of § 1955; (2) whether their gambling was "conducted by five or more persons" within the meaning of statute; and (3) whether the two counts properly charged two different offenses.[1]

I.

There is no evidence that appellants' gambling activities had any effect whatsoever on interstate commerce. Accepting the government's interpretation of the facts, however, their business was large enough to satisfy the minima specified in 18 U.S.C. § 1955. That statute, enacted on October 15, 1970, as § 803(a) of the Organized Crime Control Act of 1970, provides, in material part:

> "§ 1955. Prohibition of illegal gambling businesses
>
> "(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal

---

1 Other contentions relate to the refusal to declare a mistrial when 11 defendants changed their pleas, the number of peremptory challenges, the admissibility of the government's Exhibit 11, and the claimed variance under the reasoning of *Kotteakos v. United States*, 328 U.S. 750. As the discussion in the text, *infra*, indicates, the last contention is met by our acceptance of the government's view of the record as disclosing a single conspiracy. We find no merit in the other contentions.

gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 84 Stat. 922, 937.[2]

The Organized Crime Control Act contains a statement of findings relating to the impact of organized crime on the nation's economy. See 84 Stat. 922-923. With respect to Title VIII dealing with syndicated gambling, Congress made a special finding "that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof." 84 Stat. 936. It is fair to interpret the legislation as a whole as reflecting a broad finding by Congress that the class of gambling enterprises described in § 1955 has a sufficient impact on the interstate economy to warrant prohibition by federal criminal legislation. As we interpret the holding in *Perez v. United States*, 402 U.S. 146, that finding, which we do not question, is sufficient to support the statute even when applied

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2 As defined in the statute, "'gambling' includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." In this case appellants concede that their activities constituted "gambling" as so defined, and that they were conducted in violation of the law of Indiana.

to individual members of the class whose own activities may not have any demonstrable impact on interstate commerce.[3]

United States v. Bass, 404 U.S. 336, and *Rewis v. United States*, 401 U.S. 808, on which appellant Hunter relies, presented questions of statutory construction; in neither of those cases did the Court find a want of constitutional power to legislate. In short, we agree with the position uniformly adopted in other circuits on this constitutional issue. *United States v. Becker*, 461 F.2d 230, 233-234 (2d Cir. 1972); *United States v. Harris*, 460 F.2d 1041, 1043-1048 (5th Cir. 1972); *United States v. Riehl*, 460 F.2d 454, 458 (3rd Cir. 1972); *Schneider v. United States*, 459 F.2d 540 (8th Cir. 1972); *United States v. Palmer*, 465 F.2d 697 (6th Cir. 1972), *cert. denied* 409 U.S. 874.

II.

The contention that appellants' gambling was not "conducted" by five or more persons raises a question of law

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3 "As pointed out in *United States v. Darby*, 312 U.S. 100, the decision sustaining an Act of Congress which prohibited the employment of workers in the production of goods 'for interstate commerce' at other than prescribed wages and hours, *a class of activities* was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce.

* * *

"Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. *Maryland v. Wirtz*, 392 U.S. 183, 193.

"Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In an analogous situation, Mr. Justice Holmes, speaking for a unanimous Court, said: '[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.' *Westfall v. United States*, 274 U.S. 256, 259." *Perez v. United States*, 402 U.S. 146, 152-154.

and also a question of fact. They argue that the statutory language requires five persons in a supervisory or ownership capacity, and therefore mere runners, telephone clerks, salesmen, and the watchman may not be counted as part of the required five persons. They also argue that each of them conducted a separate business which did not, in any event, employ as many as five persons. We reject both arguments.

Our study of the legislative history persuades us that the substitution of the words "five or more persons who conduct, finance, manage, supervise, direct, or own" for the language in Senate Bill 30 which had referred to five or more persons "who participate in the gambling activity" was merely designed to exclude customers of the illegal venture. As the House Committee Report stated, the term "conducts" is broad enough to include both "high level bosses and street level employees." In short, we again accept Judge Mansfield's analysis of the issue. See *United States v. Becker*, 461 F.2d 230, 232-233 (2d Cir. 1972).

Appellants' claim that the record discloses three separate businesses rather than one is by no means frivolous. Three different kinds of lottery tickets—"dailies," "moon and lightning tickets," and "bank slips"—each owned by a different banker," were sold at the same place of business. Those premises were managed by two partners (Haering and Ferdinand) who employed about 12 persons in various capacities.[4] Haering and Ferdinand were the proprietors of the "dailies" business and received a com-

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4 Finney, Newport, Peterson, Phelps and Willey sold bank slips; Porter, Warren and Board sold all three types of tickets. Blaine and Stewart were stationed at telephones to inform customers of winning numbers; Anderson guarded the door and Taylor was the night watchman.

mission of 25% on gross sales of "moon and lightning tickets" and 35% on sales of "bank slips" made from their premises. Appellant Hunter owned the "moon and lightning" business and appellant Hill owned the "bank slips." Hunter and Hill had no contact with one another, and each employed his own runners to make deliveries to, and pick-ups from, the premises operated by Haering and Ferdinand.[5]

In familiar commercial terms, Haering and Ferdinand operated a retail outlet at which they sold their own product as well as the products of two other suppliers, Hunter and Hill. Although, as appellants plausibly argue, the three businesses are readily identifiable as separate commercial ventures, we are satisfied that the three enterpreneurs had a sufficient common interest in the development of sales, the maintenance of security, the efficient performance of services, and the solvency of all three ventures, to make it proper to regard them as a single criminal enterprise for purposes of the statutes here involved.[6] Since it is fair to charge each of the three principals with knowledge of the basic features of the total operation, it was proper to treat Hunter and Hill as participants in the same venture even though they had no direct contact with one another.

We therefore conclude that all of the defendants participated in the same conspiracy charged in Count I of the

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5 Kelly and Hanna served as intermediaries between Hunter, Haering and Ferdinand; Jackson was the runner for Hill. Hunter had never even visited Haering's premises; Hill had apparently been seen there on only one occasion.

6 Without burdening the opinion with financial detail, our study of government Exhibit 16 persuades us that none of the three businesses, if operated independently, would have supported the total operation described by the evidence.

indictment and in the same "illegal gambling business" charged in Count II. The question which remains is whether there was any material difference between that conspiracy and that illegal business.

III.

Two offenses may be separately prosecuted and punished if each requires proof of an element which the other does not.[7] The *Blockburger* test, though easily stated, is sometimes difficult to apply. Thus, on facts comparable to those before us, the Second Circuit held that seven participants in an illegal gambling venture may be prosecuted both for conspiracy to violate § 1955 and for the violation of § 1955 itself, *United States v. Becker*, 461 F. 2d 231, 234 (1972); whereas two district courts, relying on Wharton's Rule, have reached a contrary result in cases involving thirteen and eight defendants, respectively, *United States v. Greenberg*, 334 F.Supp. 1092 (N.D. Ohio 1971); *United States v. Figueredo*, 350 F.Supp. 1031 (M.D. Fla. 1972).

If a substantive offense may be committed by a single individual, a conspiracy to commit that offense, unlike an attempt, does not merge with the completed offense. This rule, which stems from the common law distinction between felonies and misdemeanors,[8] is supported by the notion

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7 "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Gavieres v. United States*, 220 U.S. 338, 342, and authorities cited *Gavieres v. United States*, 220 U.S. 338, 342, and authorities cited" *Blockburger v. United States*, 284 U.S. 299, 304.

8 "Under the early common law, a conspiracy—which constituted a misdemeanor—was said to merge with the completed felony

that conspiracy is an especially grave offense[9] and is consistent with the constitutional objection to double jeopardy.[10]

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which was its object. See *Commonwealth v. Kingsbury*, 5 Mass. 106. This rule, however, was based upon significant procedural distinctions between misdemeanors and felonies. The defendant in a misdemeanor trial was entitled to counsel and a copy of the indictment; these advantages were unavailable on trial for a felony. *King v. Westbeer*, 1 Leach 12, 15, 168 Eng. Rep. 108, 110 (1739); see Clark and Marshall, Crimes, § 2.03, n. 96 (6th ed.). Therefore no conviction was permitted of a constituent misdemeanor upon an indictment for the felony. When the substantive crime was also a misdemeanor, *People v. Mather*, 4 Wend. 229, 265 (N. Y.), or when the conspiracy was defined by statute as a felony, *State v. Mayberry*, 48 Me. 218, 238, merger did not obtain. As these common-law procedure niceties disappeared, the merger concept lost significance, and today it has been abandoned. *Queen v. Button*, 11 Q. B. 929, 116 Eng. Rep. 720; *Pinkerton v. United States*, 328 U. S. 640." *Callanan v. United States*, 364 U.S. 587, 590.

The offense charged in each count in this indictment is a felony punishable by imprisonment of not more than five years.

9 "We cannot agree that there is anything unreasonable, or inconsistent with the general policy of the Bankruptcy Act, in allowing a longer period for the prosecution of a conspiracy to violate one of its penal clauses than for the violation itself. For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States v. Rabinowich*, 238 U.S. 7, 88.

See also *Dennis v. United States*, 341 U.S. 494, 573-574 (Mr. Justice Jackson concurring)

10 Since the agreement between the conspirators is an ingredient "distinct from the completion of the unlawful project" itself, see *Pinkerton v. United States*, 328 U.S. 640, 644, and since the crime of conspiracy may be completed even though the project is unsuccessful, the *Blockburger* test is satisfied. This is not true, however, "where the agreement of two persons is necessary for the completion of the sub-

The rule is different, however, if the substantive offense requires the concerted action of two wrongdoers and they are indicted for both conspiracy and the completed crime.[11] Neither history, policy, nor the *Blockburger* formula justifies two punishments of persons who both agree to engage, and do in fact engage, in acts such as adultery,[12] bribery,[13] or a prohibited rebate transac-

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stantive crime and there is no ingredient in the conspiracy which is not present in the completed agreement." *Id.* at 643.

11 "It is the general rule that a conspiracy to commit a crime is a different offense from the crime which is the object of the conspiracy. * * *

"There is excluded from the rule conspiracies to commit crimes which in their very nature require concerted action of all the participants. In such cases, the result has such a close connection with the objective offense as to be inseparable from it. United States v. Katz, 271 U.S. 354, 355, 46 S.Ct. 513, 70 L.Ed. 986; Lisansky v. United States, 4 Cir., 31 F.2d 846, 67 A.L.R. 67." Freeman v. United States, 146 F.2d 978, 979 (6th Cir. 1945).

12 "In each of the cases of Shannon v. Commonwealth, 14 Pa. 226, and in Miles v. State, 58 Ala. 390, a man and woman were indicted for a conspiracy to commit adultery with each other. It was held in each case that the conspiracy was the same thing as the substantive offense, and the indictments were quashed. Wharton, in commenting on these cases, says:

"When the law says a combination between two persons to affect a particular end shall be called, if the end be effected by a certain name, it is not lawful for the prosecution to call it by some other name; and when the law says such an offense—e.g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course, when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable, and hence persons combining to induce others to commit bigamy, adultery, incest, or duelling do not fall within this exception, and may be indicted for conspiracy.' Wharton's Crim. Law, § 1339."

United States v. New York Central & H. R.R. Co., 146 Fed. 298, 303 (C.C.N.Y. 1906).

13 "The agreement or transaction stated in this indictment was immediately and only between two persons, one charged with the intended

tion.[14] In such cases a two-person conspiracy to commit a two-person crime is like an individual attempt to commit an individual offense.

It has been said, however, that the conspiracy to commit adultery is a separate offense when a third person participates in the arrangement;[15] obviously, such a third party is a conspirator though not guilty of the substantive offense. The status of the two principal offenders is less clear; if their agreement encompassed only a single transaction, it is difficult to see why the involvement of the matchmaker should affect their own culpability. In any event, as we read the cases presenting the question whether the participants in a consummated multi-person offense may be charged with conspiracy, they do not turn

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taking and the other with the intended giving of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses, defined in section 1781, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving, or giving. In this respect, agreeing to receive a bribe from another and agreeing to give one are unlike soliciting or offering a bribe, because the solicitation or offer may be the act of a single person and may occur without any concurrent act of another.

* * *

"Because concert and plurality of agents, in the sense we have hereinbefore shown, are essential to each of the offenses—there are two, not one—the commission of which is charged to have been the object of this so-called conspiracy, and because no other concert and plurality of agents are here charged, we are of opinion that the acts described in this indictment do not constitute a conspiracy under section 5440." *United States v. Dietrich*, 126 Fed. 664, 667-668 (C.C. Neb. 1904).

14 *United States v. New York Central & H. R.R. Co.*, 146 Fed. 298 (C.C.N.Y. 1906).

15 See Judge Krentzman's discussion of the "third person" exception Wharton's Rule in *United States v. Figueredo*, 350 F.Supp. 1031, 1035 (M.D. Fla. 1972).

on the number of participants in the conspiracy, but rather on whether or not the conspiracy charged depends on proof of an element which is not a part of the substantive offense.

State v. Clemenson, 123 Iowa 524, 99 N.W. 139 (1904), which is sometimes cited as an example of the "third person" exception to Wharton's Rule, actually sustained a conspiracy charge against an adulterer because the consent of his partner was not an element of the substantive offense in Iowa.[16] The Iowa court explained a different result reached in Pennsylvania and Alabama by the fact that the woman's consent was an element of the substantive offense in those states.[17]

The conspiracy allegations in *United States v. New York Central & H. R. R. Co.*, 146 Fed. 298 (C.C.N.Y. 1906) and *United States v. Sager*, 49 F.2d 725 (2d Cir. 1931), described agreements by more than two persons to commit substantive offenses which could be committed by only two. Those cases are thus analogous to a charge of conspiracy by more than five persons to violate 18 U.S.C. § 1955. In *Sager*, the conspiracy count alleged "concert between several intended givers of the bribe and the intended taker of the same bribe," 49 F.2d at 727; in the *New York Central* case, the indictment charged "that seven persons named and others to the jurors unknown

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16 "Nor is the consent of the female essential to constitute the crime . . . As adultery is a felony, then, and may be committed without the consent of the female. . . . there is no ground for saying that the offense may not be the subject of conspiracy." 99 N.W. 139.

17 "This case is readily distinguishable from Shannon v. Com., 14 Pa. 226, and Hiles v. State, 58 Ala. 390. In those decisions the agreement of a married woman to have intercourse with a man other than her husband was held not to amount to a conspiracy to commit adultery, for that the consent involved was a part of the offense itself." *Ibid.*

were parties to the conspiracy," 146 Fed. at 304. Both multi-person situations fell within Judge Learned Hand's statement that "when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal action of the conspirators indicted, they may not be indicted for conspiring to commit it if they have in fact consummated it. This is because the crime presupposed their mutual agreement which was therefore a part of it" *United States v. Center Veal & Beef Co.*, 162 F.2d 766, 770 (2d Cir. 1947).

In his earlier opinion in *United States v. Zeuli*, 137 F.2d 845, 846 (2d Cir. 1943), Judge Hand had summarized the rule as follows:

> "Lower Federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. United States v. Dietrich, C.C., 126 F. 664 (Van Devanter and Munger, JJ.); United States v. New York Central & H. R. R. Co., C.C, 146 F. 298 (Holt, D.J.); United States v. Sager, 2 Cir., 49 F.2d 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. United States v. Katz, 271 U.S. 354, 355, 46 S.Ct. 513, 70 L.Ed. 986; Gebardi v. United States, 287 U.S. 112, 122, 53 S.Ct. 35, 77 L.Ed. 206, 84 A.L.R. 370. Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy. The indictment was not so confined; it laid a single conspiracy which comprehended not only the disposal of the books but the original theft of them. Such a conspiracy was not within the doctrine we have just mentioned, for it covered more than the crime of receiving."

In the case before us, both alleged offenses require "the mutual cooperation" or the "reciprocal action" of a plurality of persons. The conspiracy charged in Count I is confined to the transactions described in Count II as a violation of § 1955; the conspiracy covers nothing more than the substantive crime committed by the conspirators. There is no suggestion that the proof of intent required for the violation of § 1955 is any different from the evidence required to sustain the charge of conspiracy.[18]

It is true, as the government argues, that the conspiracy charge encompasses more than five persons, the number *required* for a violation of § 1955. It is also true, and equally significant, that the substantive charge encompasses more than two persons, the number *required* for a violation of § 371.[19] But an argument which merely emphasizes the number of persons charged in the indictment does not identify an element of each offense which adequately differentiates the other. Two or more may be guilty of conspiracy; five or more may be guilty of either conspiracy or the substantive crime. But even though five or more persons are named in the indictment, a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself. We think this conclusion

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18 *Cf. United States v. Nasser*, . . . F.2d . . . (7th Cir. March 5, 1973, No. 18600) slip opinion pages 9-10; dissenting opinion page 21.

19 One of the elements of the offense defined in 18 U.S.C. § 371 is that "two or more persons conspire. . . ." The comparable language in the § 1955 definition of an illegal gambling business is that it involve "five or more persons."

is a fair interpretation of congressional intent,[20], is supported by the considerations which normally require that an attempt merge with a completed offense, and is consistent with the general rule that conspiracy is a crime separate from the individual substantive offense or offenses which the conspirators intended. We find "no ingredient in the conspiracy [charged in Count I] which is not present in the completed crime [charged in Count II]." *Pinkerton v. United States,* 328 U.S. 640, 643.

The judgment of conviction in Count I is reversed. In all other respects the judgments are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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20 See *United States v. Figueredo,* 350 F.Supp. 1031, 1036; *cf. States v. Nasser,* . . . F.2d . . . (7th Cir. March 5, 1973, No. 18600), slip opinion at pages 11-12; *Gebardi v. United States,* 287 U.S. 112.

EXHIBIT B

UNITED COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

June 13, 1973

Before

Hon. F. RYAN DUFFY Sr. Circuit Judge
Hon. ROGER J. KILEY Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

United States of America,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division
Plaintiff-Appellee,	)	
vs.	)	
No. 72-1700	)	
No. 72-1701	)	
Earl Christopher Hunter, et al.,	)	No. IP 72-CR-30
Hyland Hill,	)	
Defendants-Appellants.	)	

The petition for rehearing filed by the plaintiff-appellee the petition for rehearing filed by defendant-appellant Hill on April 27, 1973, and the petition for rehearing filed by defendants Hunter and Hill on June 1, 1973, are DENIED.

No judge in regular active service having requested a vote on the suggestion for rehearing en banc filed by the plaintiff-appellee on June 1, 1973, and, treating the petition for rehearing en banc filed by defendant-appellant Hill on April 27, 1973, as a suggestion for rehearing en banc,

no judge in regular active service having requested a vote on said suggestion for rehearing en banc, no rehearing en banc will be held in these appeals.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing petition for a writ of certiorari to the United States of Appeals for the Seventh Circuit and motion to vacate judgment upon counsel as follows:

The Honorable Stanley Miller
United States District Attorney
Federal Building
Indianapolis, Indiana 46204

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530
Department of Justice

Mr. James Manahan
129 E. Market Street No. 901
Indianapolis, Indiana 46204

Mr. William J. Dougherty
120 E. Market Street No. 933
Indianapolis, Indiana 46204

this 16th day of July, 1973, by mailing a copy thereof by first class United States mail.

James W. Bradford